NEGOTIABLE INSTRUMENTS—WAIVER OF PRESENTMENT AND NOTICE—RENEWAL NOTE.—The defendants indorsed for accommodation before a time note was delivered. At maturity the defendants delivered to the plaintiffs, the payees of the original instrument, a similar note which both parties admitted was given as a renewal. Through delay in transmission to the place of payment, the second note was not duly presented. The defendants deny notice of presentment and non-payment in a suit on the original note. *Held,* two judges dissenting, where the payee, on request of the indorser, accepts a renewal note, he need not present or protest the original note. *Clarke* v. *Stumpf* (App. Div. 2nd Dept. 1920) 180 N. Y. Supp. 125.

The right to have a negotiable instrument presented may be waived by the drawer or indorser, and such waiver may be either express or implied. *Bessenger* v. *Wenzel* (1910) 161 Mich. 61, 125 N. W. 750; *Simonoff* v. *Granite City Nat. Bank* (1917) 179 Ill. 248, 116 N. E. 636; N. I. L. § 82 (3). And similarly, notice of dishonor may be waived. N. I. L. § 109. To bind the indorser, however, his waiver must be made with full knowledge of the facts which would release him. *Toole* v. *Crafts* (1906) 193 Mass. 110, 78 N. E. 775. In most of the cases where the courts have held that a renewal agreement dispenses with presentment, there have been promises and other representations on the part of the indorser which have induced the holder or payee to accept a renewal and have led him to believe that presentment of the original instrument was unnecessary. *Bessenger* v. *Wenzel, supra; Sheldon* v. *Horton* (N. Y., 1868) 53 Barb. 23. Here the courts have refused to allow the indorser to set up a failure to present when he himself induced such failure. Yet there are several holdings that a renewal agreement, without more, is sufficient to constitute a waiver of presentment. *Iowa City First Nat. Bank* v. *Ryerson* (1867) 23 Iowa 508; *National Hudson River Bank* v. *Reynolds* (N. Y., 1890) 57 Hun 307, 10 N. Y. S. 669; *contra, Oswego Bank* v. *Knower* (N. Y., 1843) Hill & D. 122. The theory seems to be that the indorser knows that the original note is not going to be paid, and hence notice to him would be idle. In *Annear, Trustee,* v. *Kennerly,* (South Africa, 1880) 1 E. D. C. 7, it was pointed out that an agreement to renew would imply a dispensation with notice of dishonor, but would not necessarily indicate a waiver of presentment. There is much force in the argument of the dissenting opinion in the principal case that the intent of the parties was to continue the defendants' liability as merely secondary, and not to make his obligation on the first note absolute. See also *Oswego Bank* v. *Knower, supra.*

PLEADING AND PRACTICE—DISMISSAL AND NON-SUIT—WHEN PERMISSIBLE.—The plaintiff anticipating that the defendant's motion for a directed verdict would be granted moved for a voluntary dismissal just as the court was pronouncing judgment on the motion to direct. Under a statute permitting dismissal "at any time before the jury retires to consider their verdict", *held,* the plaintiff's motion was timely. *Kosinski* v. *Hines* (Wash. 1920) 187 Pac. 712.

At common law a dismissal or non-suit was obtainable at any time before a verdict. *Deneen* v. *Houghton County St. Ry.* (1907) 150 Mich. 235, 113 N. W. 1126; *see National Bank of Commerce* v. *Butler* (1912) 163 Mo. App. 380, 383, 143 S. W. 1117. And the plaintiff was entitled to such non-suit even after the defendant had established a set-off against the plaintiff's action. *See Huffstutler* v. *Louisville Packing Co.* (1908) 154 Ala. 291, 293, 45 So. 418. This obvious

injustice has been remedied in most modern statutes. Wash. Rem. 1915 Code § 408 (1). The federal courts, adopting a stricter rule than that of the instant case, have, under similar circumstances, refused the plaintiff's motion, *Cogdill* v. *Whiting Mfg. Co.* (1914) 212 Fed. 658, and *a fortiori* where the defendant's motion had already been granted. *Huntt* v. *McNamee* (1905) 141 Fed. 293. And in interpreting a state statute similar to the one under discussion, they have adhered to the federal rule. *Whitted* v. *S. W. Tel. & Tel. Co.* (1914) 217 Fed. 835; *contra, Chicago, M. & St. P. Ry.* v. *Metalstaff* (1900) 101 Fed. 769. Most of the states, however, with similar statutes have reached the same conclusion as has the Washington court, and have granted the plaintiff's motion for voluntary non-suit, even after the defendant's motion for a directed verdict had been allowed. *Daube* v. *Kuppenheimer* (1916) 272 Ill. 350, 112 N. E. 61; *Van Sant* v. *Wentworth* (1915) 60 Ind. App. 591, 108 N. E. 975; *Malone* v. *Erie R. R.* (1917) 90 N. J. L. 350, 101 Atl. 415. Where the statute covers both the cases of trial by jury and trial by judge, some courts treat a case in which there has been a directed verdict as a trial by judge. *See Adams* v. *St. Louis S. W. Ry of Texas* (Tex. Civ. App. 1911) 137 S. W. 437.

PLEADING AND PRACTICE—INCONSISTENT CAUSES OF ACTION IN SAME COMPLAINT—CONTRACT AND TORT.—The plaintiff induced by the false representation of the defendant that he had an export license, chartered him a ship which the plaintiff in turn chartered from C. The contract stipulated as liquidated damages $1,250 per day for every day's delay caused by the defendant. The ship was delayed two days because the defendant had no export license, causing the plaintiff to become indebted to the extent of $1,877. The plaintiff states causes of action in deceit and in contract. *Held,* on demurrer, one judge dissenting, that the causes of action are inconsistent. *France & Can. S. S. Corp.* v. *Berwind-White C. M. Co.* (App. Div. 1st Dept. 1920) 180 N. Y. Supp. 709).

At common law an action in tort and in contract can not be combined in the same complaint. Stephen, Pleading (Williston ed.) 303 nf.; *Courteney* v. *Earle* (1850) 10 C. B. 73. However, section 484 of the New York Code allows causes of action that are not inconsistent to be joined in the same complaint. It is necessary to look to the common law to determine what causes are inconsistent. Thus where a contract of sale is tainted with fraud the plaintiff has an election to sue in trover, replevin or contract. The former remedies are supported by the rescission of the sale and hence are inconsistent with the action in contract which affirms the sale. See *Butler* v. *Hildreth* (Mass. 1842) 5 Met. 49; *Ward* v. *Slay* (1863) 4 Best & Sm. 335. An action begun in assumpsit under a contract of sale would forever bar an action in replevin or trover. *Butler* v. *Hildreth, supra;* or *vice versa. Morris* v. *Rexford* (1895) 18 N. Y. 552; *Kenney* v. *Kierman* (1872) 49 N. Y. 164. But an action in trover will not bar an action in replevin since both are founded on rescission. See *Smith* v. *Hodson* (1791) 4 T. R. 211; 12 Columbia Law Rev. 62. In the instant case the action in deceit and contract are not inconsistent because deceit does not depend on the rescission of the contract, *Abey* v. *Adams* (1915) 89 Vt. 158, 94 Atl. 506; *Bowen* v. *Mandeville* (1884) 95 N. Y. 237, and may therefore be joined under the Code of Civil Procedure § 484. *Taft* v. *Bronson* (1917) 180 App. Div. 154, 167 N. Y. Supp. 433 (refusing to follow *Edison Electric Co.* v. *Kalbfleisch Co.* (1907) 117 App. Div. 842, 102 N. Y. Supp. 1039). The demurrer in the instant case should have been overruled.